

Wang (Migration) [2018] AATA 4736 (12 October 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mrs Ya-Hui Wang

CASE NUMBER: 1719119

DIBP REFERENCE(S): BCC2016/2370208

MEMBER: Simone Burford

DATE: 12 October 2018

PLACE OF DECISION: Perth

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl.820.211(2) of Schedule 2 to the Regulations
- cl.820.221(1) of Schedule 2 to the Regulations.
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- Statement made on 12 October 2018 at 11:54am
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CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) – Subclass 820 (Partner) visa – genuine relationship – credible witnesses – statements of support from family and housemates – consistent relationship evidence – joint finances – purchased a home together – plans to start a family – decision under review remitted for reconsideration

LEGISLATION

Migration Act 1958 (Cth), ss 5CB, 5F, 65
Migration Regulations 1994 (Cth), r 1.15A Schedule 2 cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 15 August 2017 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, Mrs Ya-Hui Wang, applied for the visa on 15 July 2016 on the basis of her relationship with her sponsor, Mr Shuo-Chun Hung. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(a) because the delegate was not satisfied that the applicant was the spouse or de facto partner of the sponsor as defined under ss.5F and 5CB of the Act.
4. The applicant appeared before the Tribunal on 10 April 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor, Mr Hung, the applicant's mother-in-law, Ms Sandy Hsueh, the parties' housemate, Mr King Tong Wong, a friend of the parties', Ms Zhuo Yang, and another friend of the parties', Mr Ping-Chang Daniel Ong. The applicant's father-in-law also attended the hearing but did not give evidence. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
5. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. The issue in the present case is whether the applicant is the spouse or de facto partner of the sponsor as defined under ss.5F and 5CB of the Act.

Whether the parties are in a spouse or de facto relationship

7. Clauses 820.211(2)(a) and 820.221(1) require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
8. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

9. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The parties submitted a copy of a Marriage Certificate issued by the Western Australian Registry of Births, Deaths and Marriages dated 6 November 2015. The certificate records a marriage between the applicant and sponsor on 20 October 2015 at C3 Church, Dalkeith, Western Australia. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

10. The Tribunal had before it the Department's file relating to the applicant. The Tribunal also had before it the delegate's decision which the applicant provided to the Tribunal with her application for review. The Tribunal had regard to the material referred to in the delegate's decision, and other material available to the Tribunal, including material submitted by the parties prior to and at the commencement of the hearing.
11. The parties were also given additional time following the hearing to provide any further information they wished the Tribunal to take into account. Material was received subsequent to the hearing and has been taken into account by the Tribunal in reaching its decision.
12. The Tribunal notes that there was limited evidence before the Department in support of the relationship. The parties provided additional information to the Tribunal including taking evidence from a number of third-party witnesses supporting the relationship and the parties' account of its history.
13. The applicant and the sponsor both gave evidence at the hearing. The Tribunal questioned them at length about their relationship. The Tribunal took evidence regarding the development of their relationship, their relationship history, knowledge of each other's background and family history, financial, social and household aspects of their relationship and the nature of their commitment to each other. Their responses were consistent.
14. The Tribunal found the applicant and sponsor to be credible witnesses and accepts their oral evidence on this basis. The Tribunal also found the supporting evidence of the other witnesses at the hearing to be credible and gives it weight in reaching its findings.
15. As noted above, in forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3) of the Regulations.

16. *Relationship background*

17. The applicant is a 32 year old Taiwanese national. Her family are all in Taiwan. Her sponsor is a 32 year old Australian citizen. He emigrated from Taiwan to Australia in 2000. His immediate family is in Australia. Neither the applicant nor the sponsor has previously been married. They both currently work as pharmacy assistants.
18. The parties gave consistent evidence concerning the development of their relationship.
19. The parties met in September 1998 when they were both students at the same Middle School in Taiwan. In 2000 the sponsor left Taiwan and moved to Australia to study. He reconnected with the applicant on Facebook in 2011. They established contact via webchat.

20. They entered into a relationship in March 2011. In mid-2011 the sponsor invited the applicant to join him in Australia to attend a friend's wedding. The applicant travelled to Australia on a three month visitor visa in July 2011 to visit the sponsor. At that time the applicant stayed with the sponsor at a rented home in Karawara while the sponsor was studying nearby at Curtin University. The applicant returned to Taiwan at the end of her visa period. The sponsor visited her in Taiwan on Chinese New Year in 2012 and they returned together to Australia in February 2012. When the applicant returned to Australia she came on a 12 month working holiday visa staying one year. She stayed with the sponsor and his parents at their home in Dalkeith and then in a home in Morley which they were house-sitting.
21. She returned to Taiwan in February 2013 and came back to Australia in May 2013 on another 12 month visa and the parties lived in Kardinya. They shared this home with another housemate. She returned to Taiwan in May 2014. She returned to Australia in September 2014 and departed with the sponsor in early November 2014 for a short holiday and returned in mid November 2014.
22. The parties got engaged in Australia in January 2015. Following the engagement the applicant returned to Taiwan in February 2015; she was joined by the applicant for a holiday in August 2015 and she returned to Australia in October 2015.
23. The parties got married on 30 October 2015. The applicant returned to Taiwan to organise a wedding banquet and wind up her business interests in Taiwan where she was a partner in a food van. The sponsor joined her in April 2016 and they returned to Australia together in May 2016. They applied for the partner visa on their return to Australia on 15 July 2016.
24. They moved to Parkwood in October 2016. At the time of the hearing they were living at an address in Parkwood with one housemate, Mr Wong, and a visiting cousin.
25. Following the hearing the parties finalised the purchase of a home in Carlisle. The home was purchased from the sponsor's parents.

26. *Financial aspects*

27. The Tribunal has had regard to the evidence provided relating to the financial aspects of the relationship including joint ownership of assets and joint liabilities, the extent of pooling of financial resources, any legal obligations owed by the parties and any sharing of the day-to-day household expenses.
28. The parties provided copies of bank statements from their joint account. The parties both have personal accounts. They also have a joint account, established in January 2015 when they got engaged, into which the applicant makes deposits and into which the sponsor's salary is paid. The joint account is then used to pay rent and utilities and family expenses. They did not start making deposits in to the account until the applicant obtained her bridging visa in late 2016.
29. At the time of the application they were sharing expenses but the applicant was not working so the sponsor was meeting the bulk of their expenses. The applicant had been supporting herself through business interests in a food truck in Taiwan. The business was wound up following the couple's marriage.
30. They now both work as pharmacy assistants at the same pharmacy. A Form 888 statutory declaration from their employer was provided.

31. The parties purchased a home in Carlisle from the sponsor's parents in April 2018. Copies of legal documents relating to the sale were provided. A loan approval for the joint mortgage on the property was provided.
32. The parties' oral testimony was consistent with the documentary evidence they provided about their financial arrangements. The Tribunal accepts this evidence.
33. The Tribunal finds on the evidence that the parties' financial arrangements are such that would indicate a genuine and committed spousal relationship at the time of the application being made and at the time of this decision.

34. *Nature of the household*

35. The Tribunal has had regard to the evidence as to the nature of the household including the parties' living arrangements and any sharing of housework.
36. The parties have neither children nor any responsibility for the care and support of children.
37. The parties had been living in an address in Parkwood since October 2016. They were renting the home from a friend who was living in Malaysia for two years. The lease end date was open, however the sponsor explained this was done in case the landlord's work posting changed and they had to return to Australia earlier than expected.
38. They have one housemate and at the time of the hearing the applicant's cousin was visiting them and staying on a working holiday visa. Prior to that they were living in a rented home in Kardinia.
39. The parties gave evidence that they both work. The applicant bears most of the responsibility of the housework and cooking but she is 'training' the sponsor.
40. They have historically shared their home with housemates. However, given the parties' ages the Tribunal finds these arrangements were not inconsistent with the household arrangements of a young married couple.
41. Their housemate, Mr Wong, testified at the hearing. He attested to the fact that the couple lived in a genuine domestic relationship. Mr Wong has been a friend of the sponsor since 2009 and first met the applicant in 2011 when she came to visit the sponsor. He gave evidence supporting the parties' account of their relationship and attested to his belief that the relationship was genuine.
42. The Tribunal finds on the sworn evidence that the nature of the parties' household is such that it would indicate a genuine spousal relationship at the time of the application being made and the time of this decision.

43. *Social aspects of the relationship*

44. The Tribunal has had regard to the evidence provided as to whether the parties represent themselves to others as being in a genuine married relationship, the opinion of their friends and acquaintances about the nature of the relationship and any basis on which the parties plan to undertake joint social activities.
45. The applicant has lived with the sponsor's parents in Australia and his parents were present at the hearing. The sponsor met the applicant's family on a visit to Taiwan for Chinese New Year in 2012.

46. The applicant's mother-in-law, Ms Hsueh testified at the hearing. She gave an account of the relationship which supported that provided by the parties. She attested to the fact that the parties were purchasing a house together and planned to start a family.
47. They had a wedding in 2015 at a church in Dalkeith. They held a reception with around 80-100 guests at a restaurant in King's Park. Photographs of the wedding were provided and several witnesses attested to having attended the wedding.
48. The parties provided supporting material including photographs and supportive statements from friends including Mr Wong, Mr Ong and Ms Yang.
49. The parties provided evidence which was consistent with social interaction with friends and family particularly within their local communities in particular in their church community.
50. Ms Yang testified at the hearing that she has known the couple since they were dating in 2011 through their church. She attended their wedding. She sees the couple every week and testified to her belief that the couple were in a genuine long-term relationship. Mr Hong, who testified at the hearing, is also a member of the couple's church and has known the sponsor since 2000. He attested to having met the applicant in around 2012 and seen the couple almost every week. He attended their wedding and his son was their pageboy. He attested to the genuineness of the relationship.
51. Additional third-party support in the form of Form 888 statutory declarations were submitted from friends of the parties including their employer, friends from work, and members of their church community.
52. The parties have attended friends' weddings together in Australia and overseas. They have travelled together in Australia and overseas. Documentary material in relation to their travel was provided.
53. The evidence portrays a couple who are committed to each other and recognised as being in a genuine and committed relationship by their friends, family and acquaintances. This is consistent with the way the couple presented at the oral hearing. The Tribunal finds, based on the oral testimony and supporting documentary evidence, that the parties represent themselves socially in such a way as to indicate a genuine spousal relationship at the time of the application and at the time of this decision.

54. Nature of the parties' commitment

55. The Tribunal has had regard to the evidence provided in relation to the nature of the parties' commitment to one another including the duration of the relationship, the length of time they have lived together, the degree of companionship and emotional support they draw from each other, and whether they see the relationship as long-term.
56. The Tribunal is satisfied that the parties first met in Middle School in the late 1990's and started a relationship in 2011. They have been married since October 2016. Throughout the relationship the parties have predominantly lived together in Australia, subject to visa limitations and the applicant's commitments in Taiwan.
57. They are both committed members of their Christian church. They are clearly both committed to their faith and regard this commitment as a foundation of their relationship.
58. The parties testified that they are purchasing a home together and are planning to start a family in the Year of the Pig, which according to the Chinese zodiac is in 2019.

59. The parties presented at the hearing as a close and committed couple. The Tribunal finds that they provide companionship and emotional support to one another and that they view the relationship as long-term. The Tribunal finds on the evidence that the nature of the parties' commitment to each other demonstrates a genuine spousal relationship at the time the application was made and at the time of this decision.

60. Summary of findings

61. Based on the evidence before it the Tribunal is satisfied that at the time of the application and at the time of the decision the parties have a mutual commitment to a shared life as a married couple to the exclusion of all others. The Tribunal is satisfied that the parties are in a genuine and continuing relationship and that they live together and not separately and apart on a permanent basis. Accordingly they meet the requirements for s.5F(2)(b)-(d) of the definition of spouse in the Act.

62. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision.

63. Therefore, the applicant meets cl.820.211(2)(a). The Tribunal accepts that the applicant was sponsored and therefore meets cl. 820.211(2)(c), and as she was the holder of a substantive visa at time of application, cl.820.211(2)(d) does not apply. The applicant continues to meet these requirements at the time of decision. She therefore meets cl.820.221(1).

DECISION

64. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl.820.211(2) of Schedule 2 to the Regulations
- cl.820.221(1) of Schedule 2 to the Regulations.

Simone Burford
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).